BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRIEDA JONES	)	
Claimant	)	
VS.	)	
	)	Docket No. 195,651
U.S.D. 315	)	
Respondent	)	
AND	)	
	)	
ALLIED MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested Appeals Board review of the February 26, 1996, Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Jan L. Fisher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Jerry M. Ward of Great Bend, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The issue raised by the claimant for Appeals Board review is the nature and extent of claimant's disability. Specifically, whether the claimant is entitled to a work disability award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Before the Administrative Law Judge, the parties stipulated that claimant injured her right shoulder on March 31, 1993, while working for the respondent. Furthermore, the parties agreed that claimant suffered a 15 percent permanent functional impairment to the body as a whole as a result of the shoulder injury. The Administrative Law Judge limited claimant to an award of permanent partial disability benefits based on this 15 percent permanent functional impairment rating. Claimant appealed and argues that the evidence in the record proves she is entitled to a higher award based on work disability. The Appeals Board agrees with the claimant's argument and therefore finds the Administrative Law Judge's Award should be modified.

On the day of claimant's injury, March 31, 1993, claimant was 62 years old and had been employed by the respondent for 17 years. Claimant was employed by the school district in the high school kitchen as a salad maker. Her primary responsibility was to maintain two salad bars during the lunch period which included setting the salad bars up before lunch and tearing the salad bars down after lunch. In addition to her salad bar making duties, claimant was required to perform other miscellaneous kitchen duties. Those duties included, but were not limited to, mopping and sweeping the floor, washing potatoes, mashing potatoes, washing and drying pots and pans.

Claimant injured her right shoulder as she was reaching above her head to get a 25-pound bag of carrots for the salad bar. The respondent first provided her medical treatment with Dr. Becker at the Citizen Medical Center in Colby, Kansas. Dr. Becker took claimant off work and later referred her to Earl Carlson, M.D., an orthopedic surgeon in Hays, Kansas. Dr. Carlson first saw claimant on May 6, 1993, and following an arthrogram, diagnosed a right rotator cuff tear. On July 30, 1993, Dr. Carlson surgically repaired the rotator cuff tear. Claimant was placed in a physical therapy program following surgery. He treated claimant through her last visit on December 19, 1994. During an examination on July 1, 1994, at the request of claimant's insurance company, Dr. Carlson assessed claimant with a 15 percent permanent functional impairment of the whole body relating to her shoulder injury. The doctor permanently restricted claimant from lifting above 10 pounds in front of or above shoulder level. Dr. Carlson was provided with a description of

claimant's salad making job and because of the heavy lifting involved opined that claimant no longer could perform that job.

At the request of respondent's insurance carrier, claimant was examined and evaluated on September 15, 1994, by orthopedic surgeon C. Reiff Brown, M.D., of Great Bend, Kansas. Dr. Brown assessed an 11 percent whole body functional impairment rating to the claimant because of her right shoulder injury. He opined that claimant was physically unable to lift objects more than a few inches above shoulder level. Dr. Brown restricted claimant's physical activities to avoid lifting more than 20 pounds above waist level; avoid repeated use of her hands more than 15 inches from her body at waist level; and avoid pushing and pulling at waist level of more than 20 pounds.

Following claimant's July 30, 1993, surgery, the school district offered claimant a job in March of 1994, working approximately eight hours per week taking lunch tickets at the grade school. This job paid $6.13 per hour compared to claimant's salad making job that paid $7.13 per hour for 40 hours per week. Barbara Alwin, food service director for the respondent, testified that claimant could have worked up to four hours per day performing additional duties such as washing pots and pans, mopping, and washing off counters. However, Ms. Alwin testified that claimant refused to perform these additional duties. Dr. Carlson's medical records contained a letter that he had sent to respondent's insurance carrier on March 12, 1994, that indicated that claimant could not do the heavy work of mopping, washing pots and pans, and jobs that required repetitious back and forth motions. Claimant also testified that she could perform only the ticket taking portion of this job because she knew her shoulder injury made it physically impossible for her to perform the heavier job duties.

Claimant worked the part-time ticket taking job the balance of the 1993-1994 school year and all the 1994-1995 school year. The respondent then offered the claimant the part-time ticket taking job for the 1995-1996 school year but claimant decided to not return to work. Claimant indicated that the job did not pay her enough for her to return to work.

Claimant's entitlement to permanent partial general disability benefits is determined by K.S.A. 1992 Supp. 44-510e(a) that provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced . . . except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Administrative Law Judge limited claimant to permanent partial disability benefits based on functional impairment, reasoning that the respondent was not given an opportunity to accommodate the claimant with a job that paid a comparable wage. The Administrative Law Judge found that claimant chose to work reduced hours and finally chose not to return to work at all. The Administrative Law Judge concluded that the presumption of no work disability applied in this case and that the evidence in the record had not overcome the presumption.

The respondent argued to the Administrative Law Judge and also to the Appeals Board that the facts of this case involve the public policy considerations set forth by the Court of Appeals in the Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995). The Administrative Law Judge agreed with the respondent and cited the Foulk case as guidance for his decision that the presumption of no work disability applied and claimant was not eligible for a work disability.

The Appeals Board finds the Administrative Law Judge's finding that the policy considerations contained in Foulk should be applied to this case is misplaced. The evidence as developed through claimant's testimony and respondent's representative Barbara Alwin's testimony established that following claimant's injury the respondent did not offer claimant a job at a comparable wage within her post-injury work restrictions. Ms. Alwin indicated claimant was offered the salad making job in the fall of 1993 immediately following claimant's July 3, 1993, shoulder surgery. Ms. Alwin, however, admitted that she recognized claimant was unable to return to her pre-injury employment at that time because claimant was still recovering from the shoulder injury. Furthermore, following claimant's release to return to work with restrictions, the Appeals Board finds the record supports the conclusion that the heavy job duties associated with claimant's pre-injury salad making job violated her post-injury permanent restrictions placed on her by either Dr. Carlson or Dr. Brown. Ms. Alwin further testified that claimant had to be physically able to perform all of the job duties of the salad making job before she could have returned to that job. Both Ms. Alwin and the claimant established that the part-time ticket taking job claimant returned to, post-injury, even if claimant was able to perform the additional duties of mopping, washing counters, and washing pots and pans was only a part-time job working four hours per day. Claimant did not have the physical ability post-injury to perform these additional duties, therefore the ticket taking job only involved working two hours per day. The ticket taking job did not pay a comparable wage, not only because of the number of hours offered, but also because it paid one dollar less per hour than claimant was making pre-injury.

The Appeals Board concludes that the facts in this case establish that claimant was never offered a job post-injury within her restrictions at a comparable wage. This is unlike the fact situation in Foulk where the claimant was limited to functional impairment because she refused to even try a job offered by the respondent at a comparable wage within her permanent restrictions. Thus, the Appeals Board concludes that the presumption of no

work disability contained in K.S.A. 1992 Supp. 44-510e(a) does not apply to the claimant and she is eligible for a work disability.

At the time of the regular hearing on August 22, 1995, claimant was 65 years of age and was retired, receiving social security and KPERS retirement benefits. Claimant testified that the last time she was employed was in 1995 when she was employed part-time by the respondent. The record does not contain evidence that claimant was actively looking for employment. However, as decided in Brown v. City of Wichita,17 Kan. App. 2d 72, 832 P.2d 365 (1992), voluntary retirement does not make an employee ineligible for a work disability award.

Two vocational experts testified in this case concerning the two components of the work disability test: (1) loss of ability to perform work in the open labor market, and (2) loss of ability to earn a comparable wage. *See* K.S.A. 1992 Supp. 44-510e(a). Mr. Gary S. Gammon testified on behalf of the respondent and Mr. Doug Lindahl testified on behalf of the claimant. Both of the experts utilized the permanent restrictions placed on claimant by Dr. Carlson and Dr. Brown.

Mr. Gammon opined that claimant had lost 39.09 percent of her ability to perform work in the open labor market utilizing Dr. Brown's restrictions. Utilizing Dr. Carlson's restrictions, Mr. Gammon found claimant had lost 88.68 percent of her ability to perform work in the open labor market. Mr. Gammon compared claimant's pre-injury hourly rate of $7.13 to the $6.12 per hour she was receiving post-injury to arrive at a 14 percent loss of earning ability.

Mr. Doug Lindahl, on the other hand, found claimant's labor market loss was 74 percent when he applied Dr. Brown's permanent restrictions to claimant's pre-injury labor market. Using Dr. Carlson's restrictions, Mr. Lindahl opined that claimant had a 100 percent labor market loss. In regard to wage loss, again applying Dr. Brown's restrictions Mr. Lindahl determined that the claimant had a 64 percent wage loss. Using Dr. Carlson's restrictions, Mr. Lindahl opined that claimant had a 100 percent wage loss. In arriving at the 64 percent wage loss, Mr. Lindahl found claimant had the post-injury ability to work at the minimum wage rate of $4.25 for 20 hours per week for the total of $85 per week. The 64 percent wage loss was determined by comparing the $85 post-injury weekly wage with claimant's pre-injury stipulated average weekly wage of $236.39.

The respondent and the claimant both argue that if the Appeals Board finds claimant eligible for a work disability then their respective vocational expert's opinion on the percentage of claimant's work disability is the most accurate and persuasive and should be adopted by the Appeals Board. The claimant questions Mr. Gammon's conclusions arguing that Mr. Gammon failed to take into consideration claimant's age and education when he developed claimant's pre-injury and post-injury labor market. Claimant points out that Mr. Gammon formulated his opinion on claimant's labor market loss simply by taking the

breakdown of the job titles into the five physical demand level categories contained in the Dictionary of Occupational Titles and applying claimant's medical restrictions to these physical demand levels. The claimant argues that this method is flawed because claimant's age and her limited education would have significantly reduced the number of jobs she could perform in each of the physical demand level categories both pre-injury and post-injury. Claimant further argues that Mr. Gammon's 14 percent of wage loss opinion is also flawed because he compared claimant's pre-injury hourly rate with her post-injury hourly rate instead of comparing weekly wage rates as specified in K.S.A. 1992 Supp. 44-510e(a).

Respondent questions claimant's post-injury and pre-injury labor market as determined by claimant's expert Mr. Lindahl. Mr. Lindahl opined that claimant, because of her education being limited to the eighth grade, did not have the ability to perform pre-injury or post injury any jobs in the sedentary job category. The respondent contends that Mr. Lindahl's labor market loss opinion is flawed because claimant did have the ability regardless of her limited education to some perform jobs both pre-injury and post-injury in the sedentary job category.

The Appeals Board has reviewed both of the methods used and assumptions made by the vocational experts employed by the parties for the purpose of determining the effect claimant's shoulder injury had on her ability to perform work in the open labor market and to earn a comparable wage. The Appeals Board is mindful that the methods used and assumptions made by both experts raise some questions in reference to the validity of their opinions. Nevertheless, the Appeals Board finds that the appropriate percentage of claimant's work disability falls somewhere between the opinion of the respondent's expert and the opinion of the claimant's expert. The Appeals Board also recognizes that as the fact finder it is free to consider all the evidence and to decide for itself the percentage of claimant's disability. *See* Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Appeals Board finds the appropriate percentage of claimant's loss of ability to perform work in the open labor market should be determined by considering equally the vocational experts' opinions based on Dr. Brown's and Dr. Carlson's permanent restrictions. This would result in a 75 percent loss of ability to perform work in the open labor market. Furthermore, the Appeals Board finds the appropriate percentage of claimant's loss of ability to earn a comparable wage should be determined by comparing claimant's pre-injury average weekly wage of $236.39 with a finding that claimant possesses post-injury the ability to earn minimum wage of $4.25 per hour for 40 hours per week or $170 per week. This would result in a 28 percent loss of earning ability. The Appeals Board concludes that both of these work disability test components should be weighed equally entitling claimant to a work disability award in the amount of 51.5 percent. *See* Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John L. Frobish on February 26, 1996, should be, and is hereby, modified and an award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Frieda Jones, and against the respondent, U.S.D. 315, and its insurance carrier, Allied Mutual Insurance Co., for an accidental injury which occurred on March 31, 1993, and based upon an average weekly wage of $236.39.

Claimant is entitled to 74.68 weeks of temporary total disability compensation (The $1,840.32 amount of temporary partial disability compensation paid was converted to 11.68 weeks of temporary total disability compensation.) at the rate of $157.60 per week or $11,769.57, followed by 340.32 weeks of permanent partial disability compensation at the rate of $81.16 per week or $27,620.37, for a 51.5% permanent partial work disability, making a total award of $39,389.94.

As of June 30, 1997, there is due and owing claimant 74.68 weeks of temporary total disability compensation at the rate of $157.60 per week or $11,769.57, followed by 147.03 weeks of permanent partial disability compensation at the rate $81.16 per week or $11,932.95, for a total due and owing of $23,702.52, which is ordered paid in one lump sum less any amounts previously paid. Thereafter the remaining balance of $15,687.42 shall be paid at $81.16 per week until fully paid or further order of the Director.

Claimant is entitled to future medical treatment only upon proper application to and approval by the Director.

All remaining orders of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this _____ day of July 1997.

_____
BOARD MEMBER

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BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Jerry M. Ward, Great Bend, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director